Supreme Court, U.S.
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No. 04-1000

IN THE

Supreme Court of the United States

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Petitioner,

v.

SHIRLEY O. FOUGHT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an ERISA fiduciary with conflicting interests from those of its insured has the burden of proving that its interpretation of the terms of a benefit plan is reasonable and is supported by substantial evidence when reviewed under the traditional arbitrary and capricious standard of review.

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STATEMENT OF THE CASE

Respondent Shirley Fought adopts and incorporates by reference the statement of undisputed facts in the Tenth Circuit's substituted panel decision of August 13, 2004. App. at 2a-6a. Furthermore, Petitioner UNUM Life Insurance Company of America's ("UNUM") statement of the case is misleading when it suggests that Ms. Fought's initial submissions to UNUM on her disability claim were based on her pre-existing coronary artery disease.

Both before it denied Ms. Fought's claim for disability benefits and throughout the appeal process documented in the administrative record, UNUM knew, and did not dispute, that Ms. Fought was disabled and that the staph infection was the reason for her disability. C.A. Aplt. App. at 39, 158, 165. UNUM also acknowledged that the staph infection was not a "pre-existing condition." C.A. Aplt. App. at 158. Nevertheless, UNUM denied Ms. Fought's claim because it insisted that the staph infection related to elective coronary bypass surgery performed in treatment of her pre-existing coronary artery disease. C.A. Aplt. App. at 165.

Proceedings Below.

Ms. Fought brought this action against UNUM pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(1)(B), to recover disability benefits under a disability insurance policy that UNUM issued to Ms. Fought's employer. UNUM was both plan administrator and the payer of benefits under the insurance policy.

UNUM initially denied that it had a conflict of interest, so Ms. Fought moved to conduct discovery into the nature and extent of UNUM's conflict. UNUM then changed tactics by admitting that it had an inherent conflict of interest. On that basis, UNUM successfully resisted Ms. Fought's discovery motion by arguing that in light of UNUM's admission, discovery into the nature and extent of its conflict was unnecessary.

UNUM moved for summary judgment. In response, Ms. Fought argued, *inter alia*, that in light of UNUM's serious conflict of interest, the district court should significantly reduce deference to UNUM's benefit denial decision under the arbitrary and capricious standard of review.[1] UNUM argued that Ms. Fought had not produced any evidence that UNUM's employees had financial incentives to deny claims or undue pressure from supervisors to deny benefits. In the absence of such evidence, UNUM contended that the sliding scale should not be weighted heavily against it, even though UNUM had opposed Ms. Fought's request to conduct discovery into these very issues on the ground that it was unnecessary where UNUM admitted an inherent conflict.

In granting UNUM's motion for summary judgment, the district court purported to take UNUM's conflict of interest

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[1] When a plan fiduciary has a conflict of interest, the Tenth Circuit, along with the majority of the circuit courts, has adopted a "sliding scale" approach, reducing deference in proportion to the severity of the conflict. *See Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 826-27 (10th Cir. 1996). The *Chambers* Court viewed the "sliding scale" approach as most consistent with the holding in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), that when a plan administrator or fiduciary is operating under a conflict of interest, that conflict must be weighed as a factor in determining whether there is an abuse of discretion.

into account and purported to apply the "sliding scale" to UNUM's denial of benefits. In reality, the district court applied a fully deferential arbitrary and capricious standard of review. The district court specifically relied on language from *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1098 (10th Cir. 1999), where the court had determined that there was insufficient evidence of a conflict and that full deference was due to the plan administrator's decision.

Ms. Fought appealed. The Tenth Circuit issued its first decision on February 6, 2004, reversing the judgment of the district court. UNUM petitioned for rehearing and the panel issued a second slightly modified decision on August 13, 2004, again reversing the district court judgment on the same grounds as in the first decision. UNUM petitioned for rehearing *en banc*, which the *en banc* court denied on October 26, 2004.

In its ultimate decision, the panel reasoned that where the plan administrator operates under a conflict of interest but the evidence shows that the decision maker is insulated to some extent from the deleterious effects of the conflict, the court should consider the conflict as a factor, weigh the conflict evidence, and reduce deference accordingly. However, where the plan administrator is an insurer with an inherent conflict of interest, or the evidence shows that the decision maker is not insulated from the effects of the conflict and/or has incentive to deny claims, then the burden shifts to the plan administrator to prove that his or her interpretation of the terms of the plan is reasonable and that the application of those terms to the claimant is supported by substantial evidence. App. 14a-15a.

Most importantly, however, the Tenth Circuit thoroughly examined the entire administrative record for Ms. Fought's claim and concluded that UNUM's interpretation of the "pre-existing condition" exclusion was unreasonable and that UNUM's application of that exclusion to Ms. Fought's claim was not supported by substantial evidence. The panel did not consider these issues to be close calls. With respect to UNUM's interpretation of the pre-existing condition exclusion, the court noted:

> UNUM seems to suggest that it need not cover anything for which it can construct a but/for story. If we were to accept this contention, we would effectively render meaningless the notion of the pre-existing clause by distending the breadth of the exclusion.

App. 22a. Likewise, when disposing of UNUM's argument that there was "conflicting evidence in the record" as to the cause of Ms. Fought's disability, the court said:

> Moreover, the only arguably conflicting evidence here is the note from Dr. Dubroff that states both that Ms. Fought may be disabled "due to her heart condition" and that her "staph infection was not a pre-existing condition. Aplt.App. at 154. The bulk of Ms. Fought's medical records indicate that she was recovering well from the surgery; the onset of the staph infection, which originated from an unknown origin, was the debilitating condition. UNUM is unable to offer "more than a scintilla" of evidence [citation omitted], that the staph infection was a manifestation of the pre-existing coronary artery disease, that it was caused by the

> pre-existing condition, or that it was substantially contributed to by or resulted from the pre-existing condition.

App. 31a. It is on this latter basis that the panel held "that the plan's language here does not reasonably apply to the attenuated chain of events between Ms. Fought's pre-existing coronary artery disease and her disabling staph infection and that UNUM's denial of benefits was not supported by substantial evidence." App. 32a.

REASONS FOR DENYING THE PETITION

UNUM's petition seeks to create a tempest, but it is a tempest in a teapot "unworthy of the solemn adjudication attempted for it."[2] UNUM's petition quotes selective portions of the Tenth Circuit's opinion and strings them together in a way which suggests a significant "conflict" among the circuits, when in fact the circuit differences are merely minor variations on the theme announced by this Court in *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 115 (1989), that reviewing courts must weigh a plan administrator's conflict of interest as a "factor" in determining whether an abuse of discretion has occurred. Given that reality, Unum's petition should be denied for three reasons.

First, there has been a significant change in the Department of Labor regulations governing claims procedures under ERISA that parallels and reinforces what the Tenth Circuit did here. The new rule applies to all claims filed under plans providing disability benefits on or after

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[2] The United States Magazine and Democratic Review, Vol. I, p. 171 (Washington, D.C. 1838).

January 1, 2002. *See* 29 C.F.R. § 2560.503-1(o). It makes no sense for the Court to spend its valuable time reviewing a decision whose primary application and impact is limited to an ever shrinking number of pre-2002 claims.

Second, the court's holding below was based on the specific facts presented by the administrative record in Ms. Fought's claim and was correctly decided on those facts. It is well settled that the Court reviews judgments, not opinions. *See Texas v. Hopwood*, 518 U.S. 1033 (1996). A fair reading of the Tenth Circuit's decision demonstrates that the court merely applied "plain language" principles to properly interpret the "pre-existing condition" exclusion in UNUM's insurance policy; that UNUM's interpretation of that clause was a grossly attenuated "but for" approach that would "effectively render meaningless the notion of the pre-existing conditions clause," App. 22a; and that the administrative record did not contain more than a "scintilla" of evidence that Ms. Fought's disability was caused by her pre-existing coronary artery disease. App. 31a. On this record, UNUM's decision would not have passed muster in any circuit, regardless of the variations in their approach to conflicted plan fiduciaries.

Third, UNUM's "presumption of actual conflict" argument is a straw man which it uses to exaggerate the minor differences between the circuit courts. UNUM alleges that the Tenth Circuit has imposed an irrebuttable presumption of an "actual" conflict and has thereby created a presumption of bias or partiality which the insurer must then rebut. Petition at 19-20. Having already admitted below that it had an inherent conflict of interest, UNUM engages in semantical hair-splitting in an attempt to draw distinctions between "apparent," "inherent," and "actual" conflicts of interest

where no distinction exists. UNUM then tries to blur the distinction between the existence of a conflict of interest and the ultimate consideration of whether the conflict of interest tainted the ERISA fiduciary's adverse benefit determination.

Here, the Tenth Circuit did not have to presume a conflict of interest on UNUM's part because UNUM plainly admitted that it had an inherent conflict of interest. Likewise, the Tenth Circuit did not presume that UNUM's denial of Ms. Fought's claim was tainted by conflict. Instead, the panel carefully considered: (1) whether UNUM's interpretation of the pre-existing condition exclusion was reasonable and concluded that it was not; and (2) whether the application of that exclusion to Ms. Fought's disability was supported by substantial evidence in the administrative record and concluded that it was not.

I. A SIGNIFICANT CHANGE IN DEPARTMENT OF LABOR REGULATIONS GOVERNING ERISA CLAIMS PROCEDURES PARALLELS AND REINFORCES THE TENTH CIRCUIT'S DECISION BELOW, MAKING REVIEW OF THIS CASE UNNECESSARY.

On September 9, 1998, the United States Department of Labor ("DOL") proposed a sweeping overhaul of the rule governing claims procedures of employee benefit plans covered by ERISA. *See* 63 Fed. Reg. 48,390 (1998) (codified at 29 C.F.R. § 2560.503-1). DOL proposed new standards "intended to ensure more timely benefit determinations, improved access to information on which a benefit determination is made, and greater assurance that participants and beneficiaries will be afforded a full and fair review of

denied claims." *Id.* The final rule applies to disability claims submitted on or after January 1, 2002 (hereinafter the "Rule").[3]

If Ms. Fought's claim for disability benefits had been subject to the Rule, the Tenth Circuit would have reached the same result, but the panel's reduction of deference analysis would be largely irrelevant. Instead of focusing on whether the plan administrator labors under a conflict of interest, the Rule effectively prohibits the questionable claims practices that UNUM used to deprive Ms. Fought of a full and fair review, and would have automatically entitled Ms. Fought to trial *de novo* in the district court, with no deference afforded to UNUM's adverse benefit decision.

For example, UNUM argued below that one of Ms. Fought's treating physicians had submitted a statement that, while confirming that her staph infection was not a pre-existing condition, also suggested that Ms. Fought's disability may be due to her heart condition. App.31a. While noting that the overwhelming weight of the evidence pointed to the staph infection as the disabling condition, the Tenth Circuit also criticized UNUM for failing to obtain an independent medical evaluation if it questioned the cause of Ms. Fought's disability. *Id.*

The Rule established the following minimum standards when, as here, a claim decision is based in whole or in part on a medical judgment:

> (iii) Provide that, in deciding any appeal of any adverse benefit determination that is based in

[3] A final rule was initially published on November 21, 2000 at 65 Fed. Reg. 70,246 (2000), but was subsequently amended to modify the effective date of the rule only as it applied to health benefit plans, and was re-published on July 9, 2001 at 66 Fed. Reg. 35,889 (2001).

> whole or in part on a medical judgment, including determinations with regard to whether a particular treatment, drug, or other item is experimental, investigational, or not medically necessary or appropriate, the appropriate named fiduciary shall consult a health care professional who has appropriate training and experience in the field of medicine involved in the medical judgment;
>
> (iv) Provide for the identification of medical or vocational experts whose advice whose advice was obtained on behalf of the plan in connection with a claimant's adverse benefit determination, without regard to whether the advice was relied upon in making the benefit determination;

29 C.F.R. § 2560.503-1(h) (iii)-(iv).

The Rule also spells out the consequences for failure to strictly comply with the minimum standards for full and fair claim reviews.

> (*l*) *Failure to establish and follow reasonable claims procedures.* In the case of the failure of a plan to establish or follow claims procedures consistent with the requirements of this section, a claimant shall be deemed to have exhausted the administrative remedies available under the plan and shall be entitled to pursue any available remedies under section 502(a) of the Act on the basis that the plan has failed to provide a reasonable claims procedure that would yield a decision on the merits of the claim.

29 C.F.R. § 2560.503-1(l). During the rule-making process, employers and insurers lobbied DOL to keep sub-paragraph (l) out of the final rule. In rejecting the insurance industry arguments, DOL clearly expressed its view as follows:

> In the view of the Department, the standards in the regulation represent essential aspects of the process to which a claimant should be entitled under section 503 of the Act. A plan's failure to provide procedures consistent with these standards would effectively deny a claimant access to the administrative review process mandated by the act. Claimants should not be required to continue to pursue claims through an administrative process that does not comply with the law. **At a minimum, claimants denied access to the statutory administrative review process should be entitled to take that claim to court under section 502(a) of the Act for a full and fair hearing on the merits of the claim.**

65 Fed. Reg. 70,256 (2000) (emphasis added). In an earlier statement addressed to the same provision, DOL also said,

> It is the Department's view that, in such a case, any decision that may have been made by the plan with respect to the claim is not entitled to the deference that would be accorded to a decision based upon a full and fair review that comports with the requirements of section 503 of the Act.

63 Fed. Reg. 48,397 (1998).

While the Rule admittedly is not directly on point as to the question presented by Ms. Fought's case, given its close relation to the factual issues that influenced the panel decision below, the Rule will doubtless have a broad influence on the circuit courts in how they address the conflicted fiduciary/ standard of review issue. At the very least, it must be conceded that the new DOL Rule requiring independent administrative review of medical decisions, and *de novo* district court review if such independent administrative review does not occur, provides an entirely different legal backdrop for deciding the question presented here. Thus, the conclusions reached by the circuit courts on the conflict of interest issue under the prior regulatory regime provide little or no insight on how the issue will play out under the new one.

UNUM's complaint that the Tenth Circuit's approach below is "rigid" and unfairly shifts the burden of proof to conflicted fiduciaries rings hollow when compared to the trial *de novo* remedy afforded claimants under the new Rule when the fiduciary does not strictly comply with the minimum standards for full and fair review. Since the new Rule applies uniformly to all plan administrators, not just those laboring under conflicts of interest, UNUM has no credible complaint of disparate treatment by the Tenth Circuit here.

In summary, the significant change in the DOL Rule governing ERISA claims procedures effectively limits the precedential value of the Tenth Circuit's decision here, as well as the decisions of other circuit courts addressed to the same issue, to a relatively insignificant and shrinking number of pre-January 1, 2002 benefit denials. For post-January 1, 2002 benefit denials, the reviewing courts will necessarily focus on whether the plan fiduciary strictly complied with

the minimum standards for providing a full and fair review, and will be less concerned with whether a plan fiduciary labored under a conflict of interest. Accordingly, it makes no sense for this Court to spend its valuable time attempting to resolve minor differences among the circuits, the importance of which have now been vastly diminished by the amendments to 29 C.F.R. § 2562.503-1.

II. THE TENTH CIRCUIT'S DECISION WAS BASED ON THE SPECIFIC FACTS IN THE ADMINISTRATIVE RECORD AND WAS CORRECTLY DECIDED BASED UPON THOSE FACTS.

UNUM devotes a scant seven paragraphs in its petition to the factual background of Ms. Fought's claim. Under UNUM's rendition, Ms. Fought's initial application for disability benefits attributed her disability to her pre-existing coronary artery disease, and only after UNUM denied Ms. Fought's claim did she suddenly raise the staph infection as the real cause of her disability. UNUM contends that it upheld its claim denial because "under its reading of the pre-existing condition exclusion, it perceived the staph infection as sufficiently related to the heart surgery to fall under that provision." Petition at 5.[4]

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[4] UNUM fails to mention that the initial application for disability benefits was submitted on June 15, 1999 by well-meaning individuals at Fought's place of work who had incomplete knowledge of Fought's medical condition at the time. On June 15, 1999, Ms. Fought was hospitalized, in extreme pain, heavily sedated and was lapsing in and out of consciousness as her body battled the effects of the staph infection.

However, the Tenth Circuit undertook a decidedly fuller and fairer review of the administrative record than did UNUM in reaching its decision. The panel concluded as follows:

> The bulk of Ms. Fought's medical records indicate she was recovering well from the surgery; the onset of the staph infection, which originated from an unknown origin, was the debilitating condition. UNUM is unable to offer "more than a scintilla of evidence" [citation omitted] that the staph infection was a manifestation of the pre-existing coronary artery condition, that it was caused by the pre-existing condition, or that it was substantially contributed to by or resulted from the pre-existing condition.

App. 31a. The panel further concluded that under UNUM's reading of the pre-existing condition exclusion, UNUM believed "it need not cover anything for which it can construct a but/for story" and that "the chain of non-proximate causation that UNUM asserts in [Ms. Fought's] case is attenuated to the point of absurdity." The court further explained:

> [UNUM's] argument necessarily goes something like this: but for the pre-existing coronary artery disease, Ms. Fought probably would not have had the surgery; but for the surgery, Ms. Fought would not have had a surgical wound; but for the surgical wound, Ms. Fought's previously undetected osteoporotic sternum would not have prevented her doctors from closing her wound in a more conventional manner, which might have given the wound greater stability and resistance to the lateral

> tension on the wound exerted by Ms. Fought's large breasts; but for the combination of the surgical wound, Ms. Fought's osteoporotic sternum and her large breasts, the wound probably would not have dehisced, thereby providing an entry point for the staph infection several weeks after the surgery; but for the fact that the staph infection was resistant to antibiotics, entered Ms. Fought's bloodstream, and eventually spread to other parts of her body, Ms. Fought would not be disabled.

App. 21a-22a.

Not only was UNUM's interpretation of the pre-existing condition exclusion objectively unreasonable, the panel also pointed out that UNUM's interpretation was undermined by DOL regulations, which require a substantial connection between a pre-existing condition and a resulting disability to trigger a pre-existing condition exclusion. App. 22a-23a. The panel also considered that UNUM's expansive interpretation of its pre-existing condition exclusion was not supported by any of the cases relied upon by UNUM and the district court and that the case most directly on point, *Vander Pas v. UNUM Life Insurance Company of America*, 7 F. Supp.2d 1001 (E.D. Wisc. 1998), ruled against UNUM on an even less attenuated set of facts. Finally, the panel noted that if UNUM had intended to exclude coverage for disabilities arising from medical or surgical treatment of a pre-existing condition, it had the opportunity to expressly add those words to the exclusion and did not do so. The panel concluded that is was unreasonable to allow UNUM to do so *post facto* to the detriment of Ms. Fought and other insureds. App. 28a.

The Supreme Court reviews judgments, not opinions. *See Texas v. Hopwood*, 518 U.S. 1033 (1996). Moreover, it is a well-settled rule that if the decision below is correct on any ground, it must be affirmed. *See, e.g., Helvering v. Gowran*, 302 U.S. 238, 245 (1937). Here, UNUM admitted an inherent conflict of interest, and the Tenth Circuit determined that in light of the admitted conflict, a reduction in deference was appropriate in reviewing UNUM's denial of benefits. However, regardless of whether the Tenth Circuit reduced deference more than might have occurred in another circuit, under the facts of Ms. Fought's case, UNUM's benefit denial was arbitrary and capricious in *any* circuit even under the most deferential standard of review employed in conflict-of-interest cases.

III. UNUM's CLAIM THAT THE TENTH CIRCUIT HAS ESTABLISHED A "PRESUMPTION OF CONFLICT" IS OVERBLOWN AND UNWORTHY OF CERTIORARI.

UNUM complains that the decision below equates an apparent or inherent conflict with an actual conflict and creates a "presumption of wrongdoing that the fiduciary must rebut." Petition at 19. UNUM engages in semantical hairsplitting in an effort to draw distinctions where none exist. Black's Law Dictionary defines "apparent" as follows:

> That which is obvious, evident, or manifest; what appears or has been made manifest. That which appears to the eye or mind; open to view; plain;

> patent. In respect to the facts involved in an appeal or writ of error, that which is stated in the record.[5]

Webster's Dictionary defines "inherent" as, "Existing as an essential constituent or characteristic: INTRINSIC."[6] It is undisputed that UNUM admitted to having an inherent conflict of interest. *See* C.A. Aplt.App at 12, 25. In its petition UNUM claims that the Tenth Circuit misunderstood its concession that, in fact, UNUM was only admitting an "*apparent* conflict" as opposed to an actual conflict. Petition at 8. Based on the foregoing definitions, this is a distinction without a difference.

If what UNUM really means to argue is that its denial of benefits was not tainted by its inherent conflict of interest, that is, of course, a factual issue that the Tenth Circuit has already resolved. The court of appeals recognized that the best evidence on that issue was whether UNUM's interpretation of its "pre-existing condition" exclusion was reasonable and whether its application of that exclusion to Ms. Fought was supported by substantial evidence in the administrative record. As previously noted, the panel examined the entire administrative record and concluded as a matter of law that UNUM's interpretation was unreasonable and its benefit denial was not supported by substantial evidence.

Furthermore, UNUM's repeated assertions that the Tenth Circuit has created a "presumption of wrongdoing" or a "presumption of actual partiality" are not supported in that

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[5] BLACK'S LAW DICTIONARY 88 (5th ed. 1979).

[6] WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 629 (1988).

court's opinion. The word "presumption" does not even appear in the Tenth Circuit's opinion. UNUM apparently believes that because the court of appeals required it to prove that its interpretation of the plan was reasonable and that its benefit denial was supported by substantial evidence in the administrative record, the court of appeals was establishing a presumption of wrongdoing. However, the threshold showing of reasonableness and substantial evidence has, for decades, been the bedrock for sustaining a plan administrator's decision under the traditional arbitrary and capricious standard of review. The court of appeals simply puts insurers on notice that decisions based on strained and questionable interpretations of the plan and selective or self-serving consideration of the evidence will not be sustained.

In summary, UNUM's petition goes to great lengths to portray the Tenth Circuit's decision as extreme and at odds with this Court's guidance in *Firestone*. However, a fair reading of the decision below demonstrates that UNUM's arguments are not well taken. Petitioner's position is inconsistent with the existing ERISA regulations on the subject. The TenthCircuit's judgment in this case was based on UNUM's grossly attenuated "but for" analysis of the pre-existing condition clause in the contract of insurance, which was arbitrary under any standard of review. And, in any event, the Tenth Circuit's approach is in harmony with *Firestone* and in accord with a solid majority of circuit courts, which have adopted the "sliding scale" approach to reducing deference in the case of conflicted ERISA fiduciaries.

CONCLUSION

For the foregoing reasons, Respondent urges that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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